

*United States Court of Appeals
for the Second Circuit*



**SUPPLEMENTAL
BRIEF**

76-4054

SUPPLEMENTAL BRIEF FOR
RESPONDENTS AFTER REMAND

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4054

RCA GLOBAL COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

ITT WORLD COMMUNICATIONS INC., et al.,
Intervenors.

ON REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF THE ISSUE

Whether the Commission acted arbitrarily or capriciously when it affirmed that the new formula herein adopted for the distribution to international record carriers of unrouted international telegrams would better serve the public interest and be more equitable than the formula it was replacing which had been adopted 33 years ago under very different circumstances.

TABLE OF CONTENTS

	<u>Page</u>
COUNTERSTATEMENT	
A. <u>Background.</u>	2
B. <u>Appellate Review.</u>	3
C. <u>Commission Proceedings on Remand.</u>	8
1. <u>Carrier Comments.</u>	10
2. <u>Commission Decision.</u>	10
	13
ARGUMENT	
I. <u>THE RECORD CONTAINS AMPLE EVIDENCE SUPPORTING THE REASONABLENESS OF THE 1976 FORMULA.</u>	17
A. <u>Defects of the 1943 Formula.</u>	17
B. <u>The 1976 Formula.</u>	19
II. <u>THE COMMISSION'S PROCEDURES ON REMAND WERE ADEQUATE.</u>	28
CONCLUSION	30

(i)

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<u>Abbott Laboratories v. Gardner</u> , 387 U.S. 136 (1967).	24
<u>Burlington Truck Lines, Inc. v. U.S.</u> , 371 U.S. 156 (1962).	24
<u>Citizens To Preserve Overton Park v. Volpe</u> , 401 U.S. 402 (1971).	24
<u>FCC v. RCA Communications, Inc.</u> , 346 U.S. 86 (1953).	25
<u>Gross v. FCC</u> , 480 F.2d 1288 (2d Cir. 1973).	29
<u>Hawaiian Telephone Co. v. FCC</u> , 498 F.2d 771 (D.C. Cir. 1974).	8, 25
<u>National Association of Motor Bus Owners v. FCC</u> , 460 F.2d 561 (2d Cir. 1972).	29
<u>National Nutritional Foods Ass'n. v. Weinberger</u> , 512 F.2d 688 (2d Cir.), <u>cert. denied</u> , 423 U.S. 827 (1975).	24
<u>Pocket Phone Broadcast Service, Inc. v. FCC</u> , 538 F.2d 447 (D.C. Cir. 1976).	25
<u>RCA Global Communications, Inc. v. FCC</u> , 559 F.2d 881, <u>rehearing granted</u> , 563 F.2d 1 (2d Cir. 1977).	passim
<u>United States v. Allegheny-Ludlow Steel Corp.</u> , 406 U.S. 747 (1972).	24
<u>Western Union International, Inc. v. FCC</u> , No. 77-4183 (2d Cir., Dec. 21, 1977).	29
<u>Administrative Decisions:</u>	
<u>Application for Merger of the Western Union Telegraph Co. and Postal Telegraph Co.</u> , 10 FCC 184 (1943).	19

Page

Statutes:

Administrative Procedure Act:

5 U.S.C. 551(4)	24
5 U.S.C. 553	24
5 U.S.C. 706(2)	24

Communications Act of 1934, as amended,
48 Stat. 1064, 47 U.S.C. 151-609:

47 U.S.C. 151	6
47 U.S.C. 222(e)(1)	3
47 U.S.C. 222(e)(3)	passim
47 U.S.C. 405	29

Other Authorities:

Report of the Committee on Interstate Commerce,
United States Senate, 77th Congress, 1st
Session, Report No. 769, October 28, 1941).

17

COUNTERSTATEMENT

In 1976 the Federal Communications Commission found that the formula, which since 1943 had governed the distribution to international record carriers (IRCs) of unrouted telegrams bound for international points, had with the passage of time become unjust, unreasonable, inequitable, and not in the public interest. Consequently, as required by Section 222(e)(3) of the Communications Act, the old formula was repealed and replaced with one which the Commission felt is just, reasonable, equitable and in the public interest. Petitioner, RCA Global Communications, Inc. sought review, and this Court, finding that the 1976 Formula was not adequately supported by the record, ordered a "limited remand" for further consideration ^{1/} by the agency. ^{1/} RCA now seeks review of the Commission ^{2/} Order ^{2/} issued in response to that remand.

1/ RCA Global Communications, Inc. v. FCC, 559 F.2d 881, rehearing granted, 563 F.2d 1 (2d Cir. 1977).

2/ International Record Carriers' Scope of Operations in the Continental United States, Including Possible Revisions to the Formula Prescribed under Section 222 of the Communications Act, FCC 77-805 (January 6, 1978) (SJA) .

A. Background.

Our earlier brief and the Court's July 27, 1977 opinion adequately detail events preceding the order here under review. However, we offer a brief summary for the convenience of the Court.

When Congress acted to permit the merger of the Western Union Telegraph Co. (WU) and the Postal Telegraph Company, it recognized that it was permitting a virtual monopoly of the domestic message telegraph industry. Because the IRCs were dependent upon the domestic carriers to pick up and forward international telegrams to them, Congress wanted to ensure that WU would not be in a position to favor its own international operations (WU Cables) or any other IRC. Therefore, it included in the merger legislation a requirement that WU distribute the international telegrams among the IRCs "in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve." 47 U.S.C. 222(e)(1).

Pursuant to the Congressional directive, the Commission adopted an international formula in 1943. The formula sought to insure that each IRC was given the same share of international telegram traffic to overseas areas that it had held in the base year of 1942. If a customer routed

a telegram via a specific carrier, WU was required to honor the routing. The unrouted traffic was used to maintain the 1942 proportionate distribution. If a carrier increased its proportionate share by obtaining more routed traffic, the balance was maintained by deducting an equivalent amount of unrouted traffic which it would otherwise have obtained. Conversely, if a carrier's routed traffic declined, it would be awarded additional unrouted traffic. 57 FCC 2d at 20 (SJA 1131).

The formula worked as intended for many years. However, when the Commission reviewed it in 1976, it found that conditions in the industry had so changed that less than 12% of the total outbound messages were still subject to the balancing provisions, International Record Carriers' Scope of Operations, 57 FCC 2d 190, 202 (SJA 1133). This disparity had emerged because:

The IRCs expanded their gateway operations, and self-generated traffic (by definition specifically routed) became a more important part of total traffic than it was during the base year. The rapid increase in gateway-originated traffic upset the delicate balance needed for the formula operation and caused a proportionate decline in the relative amount of unrouted traffic available to redress imbalances. This led to the emergence of the "overages" and "deficiencies" which have plagued formula administration since its inception and led to the effective demise of the proportionate distribution system. 3/

3/ 57 FCC 2d at 201. (SJA 1132).

A carrier obtained an overage when it got so much routed traffic that it exceeded its quota. Conversely, a deficiency occurred when a carrier received insufficient routed traffic to satisfy its quota. Over the years the pool of unrouted messages to many subareas became so small that deficiencies could not be made up; and therefore the carriers began to accumulate overages and deficiencies. By 1976, the accumulations were so high that they could probably never be corrected. RCA had accumulated deficiencies of \$49.8 million, while ITT had accumulated overages of \$24.6 million and WUI overages of \$24.8 million. 57 FCC 2d at 201 (J.A. 15-16).

The practical result of all this was that the unrouted traffic all began to go, not to the carriers who were most successful in attracting traffic, but to those who were the least successful. For example, the Commission found that RCA had been relatively unsuccessful in attracting traffic on its own, but instead of declining, RCA's market share had increased because the formula just gave it more and more unrouted traffic. 57 FCC 2d at 201 (J.A. 16). As this continued, the ultimate effect has been that the carrier with the largest deficiency had come to receive all unrouted traffic to a given destination. The situation had reached the point that all the unrouted messages to

most destinations were given to a single carrier. 57 FCC 2d at 200, 202 (J.A. 14, 17).

The Commission found that such inequities had created a situation where the formula was a disincentive rather than a stimulus to improve service and increase efficiency. As such, it concluded that the 1943 formula was "ill-designed" to advance the Commission's goal of providing the citizens of the United States "a rapid efficient communications service with adequate facilities and reasonable charges. 47 U.S.C. §151." 57 FCC 2d at 208 (SJA 1139).

As a replacement for the 1943 formula, the Commission proposed to move to a method of distributing all the messages on the basis of customer choice. It thought this all-routed approach would best serve the public interest since "the public will make its own decisions." 57 FCC 2d at 209 (SJA 1140). However, the Commission lacked sufficient information to decide how best to implement such a plan or weigh its economic consequences. Therefore, it directed the interested parties to submit comments addressing pertinent matters "concerning the implications of the all-routed approach and the means to implement it in an expeditious and orderly fashion." 57 FCC 2d at 210 (SJA 1141).

For the intervening time until the all-routed proposal could be adequately assessed, the Commission prescribed the "interim formula" under which unrouted messages would be distributed to the IRCs in the same proportion as the carrier has routed messages to each destination. The Commission felt that this would be an equitable means of distribution which would provide incentives for the IRCs to improve service efficiency and maintain low costs for the benefit of the public. 57 FCC 2d at 210 (SJA 1141).

RCA sought a stay of the Order from the Commission, and WUI filed a petition for reconsideration. These were denied on September 27, 1976.^{4/} RCA subsequently sought a stay from this Court, which was denied on October 19, 1976. The interim formula went into effect on November 13, 1976.

^{4/} International Record Carriers' Scope of Operations in the Continental United States Including Possible Revisions to the Formula Prescribed Pursuant to Section 222 of the Communications Act, 61 FCC 2d 183 (1976).

B. Appellate Review.

RCA's petition for review was based primarily on two points: (1) that the Commission's hearing procedures were inadequate; and (2) that the interim formula was not supported by adequate evidence. The Court ruled against RCA on the first issue, finding that the comprehensive notice and comment procedure utilized, aided by a lengthy statistical study, and written submissions by all the parties satisfied the "full hearing" requirement of this case. 559 F.2d at 887 (SJA 941).

However, on the second issue, the Court faulted the Commission for not presenting "sufficient support for their conclusions in order that the court can properly review their decision." 559 F.2d at 891 (SJA 945) (quoting from Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 777 (D.C. Cir. 1974)). The Court was aware that only the interim formula had been implemented, but it was troubled by the fact that the interim formula appeared to be tied to the all-routed proposal since the Commission had directed all the parties "to devote their efforts to forcing the public into an all-routed system." 559 F.2d at 890 (SJA 944). It concluded that the Commission had not adequately shown that the interim formula would benefit the public interest, and accordingly, remanded the case to permit the Commission

to carry out its stated intent to examine the unresolved questions concerning the "possible operational, economic and legal implications" of the all-routed proposal.

Id. at 891 (SJA 945).

The Commission and intervenors ITT and TRT, petitioned for rehearing. They argued that the Court had misunderstood the statements concerning the all-routed proposal, and that the interim formula was justified on its own merits, totally apart from the all-routed proposal which might never be implemented. The Court granted rehearing, saying it had no intention "to invalidate the entire result of the FCC's efforts." 563 F.2d at 2 (SJA 947). Its concern was that "[t]he FCC Orders would appear to affect the carriers at the present time as to expenses possibly being incurred in preparation for an 'all-routed' system."

Ibid. Accordingly, it limited its remand to enable the FCC to show "whether the promulgation of the 'interim' formula has, in the opinion of the FCC, a factual basis in the record independent of the FCC's tentative preference for an all-routed system." Id. at 3 (SJA 948). The parties were to be permitted to present additional facts and arguments, but "[b]ecause of the importance of the time element," the Court suggested that such additional evidence be submitted within 30 days and that the FCC make its findings within 60 days. Ibid.

C. Commission Proceedings on Remand.

Pursuant to the Court's suggestion, the Commission on October 7, 1977 invited interested parties to file additional comments by November 5, 1977. Ltr. from Chief, Common Carrier Bureau, October 7, 1977 (SJA 972). Additional pleadings were submitted by WU, RCA, ITT, WUI, and TRT. The Commission also obtained a statistical study, prepared by the International Quota Bureau, which showed the actual distribution of international telegraph traffic under the interim formula during the period from January 1, 1977 to June 30, 1977. The Commission's order on remand was adopted November 30, 1977, 4 days before the deadline suggested by the Court. (SJA 949).

The Commission first addressed the evidence received concerning the efficacy of the all-routed proposal. The comments were unanimously negative, and the Commission concluded, as the Court already had suggested, that the proposal had no significant public advantages, but instead had the potential to disserve the public interest by adding to customers' costs and disrupting the present convenience of the service (SJA 951). Accordingly, this aspect of the proceeding was terminated without further action. Ibid.

1. Carrier Comments.

As might be expected, the additional comments on the interim formula varied according to whether the carrier

stood to gain or lose traffic. RCA and WUI opposed the interim formula while ITT and TRT supported it. Western Union took a neutral position, stating it favored a formula mode of distributing traffic over the all-routed proposal, but that it had no preference as to what formula should be prescribed.

RCA stated it opposed the interim formula because it allegedly imposed unnecessary solicitation costs on the IRCs, caused traffic to be shifted from direct circuits to less efficient indirect circuits which also resulted in increased payments to foreign administration, and encouraged the IRCs to concentrate their marketing efforts on existing customers who already route their traffic. RCA preferred that the Commission retain the 1943 formula, but argued that if a revision was called for there were better methods than the 1976 formula. It proposed three different approaches which would supposedly minimize the detrimental effects RCA perceived in the interim formula. Comments of RCA, pp. 23-29 (SJA 996-1002).

WUI's opposition centered around the possibility that the formula would cause a large shift of traffic from one carrier to another which would leave the carrier losing traffic with substantial unused switching and transmission capacity, and could overload the recipient's

facilities leading to a reduced quality of service. However, contrary to RCA's fear that the 1976 formula would impose unnecessary solicitation costs on the IRCs, WUI stated that the interim formula had not caused it to increase solicitations to date, and that it was not expected to do so in the future (SJA 1016).

ITT supported the interim formula on the grounds that it replaced the inequitable distribution of the 1943 formula with a fair allocation of traffic among each of the participating carriers, is administratively simpler than the 1943 formula, and permits faster and more efficient distribution of traffic. As a practical demonstration of how the 1976 Formula benefited the public interest, ITT listed several major service improvements which it had implemented at least in part because of the incentives provided by the new formula (SJA 1040-1044).

TRT argued that the Interim Formula performs an important public service by which the choices of knowledgeable consumers can be extended to those customers who because of inadequate overseas communication requirements, do not become sufficiently informed about the merits of particular carriers. Contrary to RCA's dire predictions, TRT had experienced no increase in either promotional or operating expenses as a result of the interim formula. Its promotional efforts continued to be aimed at high-volume users, and it had not

undertaken any significant effort to obtain routed traffic from those who customarily do not route messages. The capacity of its automated message switch had been adequate to handle the additional traffic generated under the 1976 Formula, and all traffic received was transmitted over, circuits then in place or necessitated by the commencement of direct circuit operations to a new overseas point.

2. Commission Decision.

The Commission affirmed that "the interim formula is just, equitable, reasonable and in the public interest on its own merits and that it is in no way dependent for its justification on a required routing system of distributing international message to telegraph traffic." (SJA 964). In contrast to old formula which was inequitably distributing international message telegraph traffic." (SJA 964). In contrast to the old formula which the Commission felt was inequitably distributing the unrouted traffic to most overseas destinations to one carrier, the 1976 formula "provides each carrier with the same opportunity as every other carrier to share in the pool of unrouted overseas messages." (SJA 963).

The Commission viewed the public interest as calling upon the agency to acquire the best service possible at the lowest possible rates. It recognized that it is

mostly the large knowledgeable users that route traffic, and that their selections as to carrier are based on service and price considerations. Therefore, the Commission determined that the 1976 formula maximized the IRC's incentives to provide the very best by eliminating those provisions of the 1943 formula, which had discouraged service improvements and lower costs by awarding all unrouted traffic to individual destinations to the IRC that was least successful in attracting routed traffic. The new formula would encourage such improvements by using the pool of unrouted messages to reward the carriers that are more successful in attracting routed messages. (SJA 960). The Commission found, that "[t]he service and price improvements made to attract knowledgeable users also enhance the quality of service to casual users since the facilities making up the service are blind to the identity of customers and to the manner in which the message came to be the responsibility of the carrier." (Ibid.)

The Commission found little merit in RCA's theory that the new formula would cause the IRCs to increase their solicitation expenses. Although RCA argued that a nationwide marketing and advertising campaign would cost \$2,007,000, it was plain to the Commission "that no carrier including RCA Globcom plans to undertake such an effort." (SJA 958). RCA evidently had increased its yearly

solicitation expenses from \$340,000 to \$670,000, but it failed to make any factual showing that this was in any way harmful to the public interest. In fact the Commission believed that added emphasis on marketing would "soon give rise to efforts, like those of ITT Worldcom, to improve, where possible, the facilities underlying service to the public." (SJA 958).

Nor did the Commission accept the argument that the 1976 Formula would disserve the public interest because it would cause some shifting in service from carriers having direct circuits to carriers having only indirect circuits. RCA estimated that 50,000 messages had been affected in this manner in 1977, and that this had caused \$130,000 to be paid from domestic tolls to foreign carriers. The Commission concluded that this shift of traffic was so amall, about one half of one percent of the 7,887,664 worldwide annual messages,^{5/} that it did not pose any perceivable threat to the public interest. (SJA 959). Moreover, the Commission pointed out that it had decided in the 1976 Order to permit carriers to transmit unrouted traffic via indirect circuits. To have done otherwise would have left significant gaps in the distribution of unrouted traffic since there are

^{5/} The Commission's calculation was slightly off. Actually, the 50,000 messages comprise .0063 of the 7,887,664 messages.

numerous foreign destination points which no carrier serves directly. Furthermore, the Commission wanted to make sure that the small carriers, who serve a higher percentage of their service points through interconnection, would have equal access to the pool of unrouted traffic. Ibid.

Each of RCA's alternative proposals was considered in turn, and found not as beneficial to the public interest as the 1976 Formula. (SJA 961-962). The Commission concluded that the 1976 Formula had functioned smoothly during its year of operation, and that it could be expected to encourage more service improvements such as those already inaugurated by ITT. Therefore it determined to permit the interim formula to remain in effect on a permanent basis. (SJA 964).

ARGUMENT

I. THE RECORD CONTAINS AMPLE EVIDENCE SUPPORTING THE REASONABleness OF THE 1976 FORMULA.

A. Defects of the 1943 Formula.

Section 222(e)(3) of the Communications Act, 47 U.S.C. 222(e)(3), provides:

Whenever, upon a complaint or upon its own initiative, and after a full hearing, the Commission finds that any such distribution of telegraph traffic among telegraph carriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraph traffic, or the division of charges therefor, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers.

Congress did not suppose that any one formula would forever be able to meet all four standards it supposedly met when first adopted. Its use of the disjunctive "or" makes it clear that the FCC is to take steps to revise the existing international formula whenever it becomes either "unjust, unreasonable, or inequitable, or not in the public interest." Thus, even if the formula violated only one of the four standards, ^{6/} it would have to be revised.

6/ In a Report of the Committee on Interstate Commerce United States Senate, 77th Congress, 1st Session, Report No. 769, October 28, 1941, p. 25, Congress made clear that the public interest goal was distinct from the equity goal.

When the Commission examined the 1943 Formula, it found that during the 33 years of its operation, the international telegraph area had so changed that the old formula had become deficient on all four counts. As the carriers had expanded their gateway operations generating more routed traffic, the pool of unrouted traffic had shrunk to the point that there were not enough unrouted messages to maintain the quotas as intended by the formula's drafters. 57 FCC 2d at 201 (SJA 1132).

The result was that the 1943 Formula was operating in an "unreasonable" manner. The formula had been intended to maintain a proportioned distribution of all the traffic, but by 1976 proportioned distribution was in effect for only 15% of total traffic. As can be seen from the graph at p. 198 of the Report and Order (SJA 1129), almost 2/3 of the unrouted traffic was distributed exclusively to one carrier serving the destination point. True, the unrouted traffic was being distributed, but it was in ^{7/} an illogical, purposeless fashion.

7/ RCA makes an argument, earlier espoused by WUI, see 57 FCC 2d at 202 (SJA 1133), to the effect that the 1943 Formula wasn't really inconsistent with public interest goals because only about 11% of the traffic distributed by WU was subject to the balancing provisions whereby a carrier's gain of a routed message could be offset by the loss of an unrouted message. Br. pp. 48-49 and fn. p. 48. A formula can hardly be called reasonable, when the best one can say for it is that it does not violate the public interest too much because it no longer works as it was intended. As the Commission noted, this argument simply reemphasizes the formula's operation has become distorted over the years. 57 FCC 2d at 202 (SJA 1133).

The 1943 Formula was unjust and inequitable because, instead of permitting all the IRCS to share in the unrouted traffic as originally intended, it had deteriorated to the point that for most destinations one carrier received all the unrouted messages. 57 FCC 2d at 200-202, (SJA 1131-1133). The carrier receiving this windfall was the one that was least successful in attracting routed messages. This, in turn, resulted in a formula "not in the public interest." Instead of acting as an incentive to "progress in providing efficient and economical service" was originally intended,^{8/} the formula was actually a disincentive to such improvements because it worked to reward the carrier with the largest deficiency. 57 FCC 2d at 202 (SJA 1133).

B. The 1976 Formula.

The Commission's 1976 Formula meets all four statutory standards set forth in Section 222(e)(3). It satisfies the "reasonableness" requirement because it distributes traffic in a rational manner consciously designed to meet the needs of the public and the industry as they exist today.

The 1976 Formula satisfies the justness and equity tests because it "provides each carrier with the same opportunity as every other carrier to share in the pool of unrouted overseas messages Western Union receives." (SJA 963). Thus, it is no longer possible for "RCA to sit back and do nothing to counteract

8/ Application for Merger of the Western Union Telegraph Co. and Postal Telegraph Co., 10 FCC 184, 1975 (1943).

tactics by its competitors and rely upon the 'formula' to give it the lion's share of the unrouted business." 563 F.2d at 2 (SJA 947). No carrier will be arbitrarily deprived of unrouted traffic to any destination it serves, since each carrier now has a degree of control over the unrouted traffic it is awarded through its ability to earn routed traffic. (SJA 962).

Unable to dispute the obvious equity of the 1976 Formula, RCA falls back to arguing that equality of access to unrouted traffic was not a criterion of the 1943 Formula, and the Commission has erred now by failing to demonstrate why this consideration should take precedence over the carriers' 1943 mutual agreement. Br., pp. 45-47. The Commission's detailed findings concerning the changes in the international telegraph market since 1943 and the resulting inequity of the old formula are adequate answers to this contention. As the Court has already observed, RCA has no "right in perpetuity to a fixed share of the telegraphic market regardless of changing conditions and circumstances." 563 F.2d at 2 (SJA 947).

In its opinion on rehearing, the Court expressed the view that:

It may well be that "public interest" is not a necessary factor to be considered in view of the fact that there seems to be no contention that the best-known technological methods of transmission are not being used and that no detriment is being suffered by the public from operations under the old or new formula. 9/

9/ 563 F.2d at 2 (SJA 947).

This statement is as accurate as far as it goes. In the year that the 1976 Formula has been operating it has been "functioning smoothly." (SJA 961). Therefore, one might legitimately take the view that since the telegrams were efficiently delivered under both formulas the public interest is not "adversely effected" and the Commission must only "cope with the remaining first three requirements." 563 F.2d at 2-3 (SJA 947-948).

However, the Commission took into consideration other public interest aspects of the international formula, specifically that the 1943 Formula had ceased to provide any incentive for better service. Admittedly, the Commission was not able to quantify any negative impact from this development, but it was nevertheless concerned that because of it, service might not have been improved as much as possible. 57 FCC 2d at 202 (SJA 1133). Accordingly, from this standpoint, the Commission reasonably viewed the 1976 Formula as a major improvement since it provided a "powerful incentive" for carriers "to continually strive to offer the public the best service possible at the lowest possible rates." (SJA 959). We submit, therefore, that the public interest is not a neutral factor in this case, but is significantly benefited by the replacement of the 1943 Formula with the 1976 Formula.

The only arguments RCA can muster in opposition to this conclusion are the same frail contentions it put before the Commission. Br. pp. 40-44. First, it points to the fact that 50,000 unrouted telegrams may be diverted from direct to

indirect deliveries each year. Even RCA concedes this "may be of relatively immodest magnitude," Br. p. 40, thus declining to contest the Commission's conclusion that this shift of one half of one percent of the 7,887,664 worldwide annual messages the carriers transmit is not significant enough to pose any perceivable threat to the public interest. (SJA 959). Moreover, this slight disadvantage was taken into account when the 1976 Formula was first adopted. In the Report and Order, the Commission determined that permitting unrouted traffic to be transmitted over interconnected circuits was preferable to reliance on a direct circuit approach which would leave significant gaps in the distribution of unrouted traffic since there are numerous foreign destination points which no carrier serves directly. In addition, if the Commission did not permit such indirect transmission, it would deny substantial portions of unrouted traffic to small carriers who serve a higher percentage of their service points through intermediate connections. (SJA 959, citing, 57 FCC 2d at 210-21, SJA 1141-1142).

Next, RCA claims that when the interim formula becomes final, each carrier will have to commit "millions of dollars" for additional advertising and marketing effort. It calculated that a marketing campaign to reach both occasional and business users would cost \$2,007,000. However, it admitted that it had not embarked upon such a campaign, but had only increased its expenditures by \$340,000.

No other carrier supported RCA on this point. In fact, TRT asserted that it had not incurred "any increases in either promotion or operating expenses as a result of the adoption of the 1976 Formula." TRT Comments (SJA 1074). Even WUI, RCA's staunch ally before the Court, denied that there was any evidence to support the theory that the interim formula would cause increased solicitation costs. WUI presented an affidavit demonstrating that it had "not changed its sales solicitation efforts as a result of the interim formula." Ibid. Consequently, the Commission reasonably refused to believe that any carrier would undertake the extravagant campaigns feared by RCA. Nor was there any evidence that the public interest would be disserved by added emphasis on marketing. The Commission anticipated that such an environment "will soon give rise to efforts, like those of ITT Worldcom, to improve where possible, the facilities underlying service to the public." (SJA 958).

While the Commission was hopeful that under the interim formula the IRCS would increase their marketing efforts toward occasional users as part of an effort to encourage them to route their messages directly, the fact that this has not occurred in no way detracts from the validity of the interim formula. There was never any thought that all messages would become routed under the interim formula. It was always recognized that distribution under

the interim formula would depend upon the carriers' success in obtaining routed messages. The public interest goals will be obtained regardless of who the exact people routing traffic may be:

By correlating the distribution of unrouted messages with routed messages, we insure that improvements in service or prices which earn the business of knowledgeable users will also be rewarded by unrouted messages. Thus, the incentive to provide the very best is maximized and the public interest will benefit accordingly. The service and price improvements made to attract knowledgeable users also enhance the quality of service to casual users since the facilities making up the service are blind to the identity of customers and to the manner in which the message came to be the responsibility of the carrier. 10/

10/ (SJA 960). The international formula being an "agency statement of general * * * applicability and future effect designed to implement * * * or prescribe law or policy, plainly comports with the definition of "rule" in Section 2(c) of the Administrative Procedure Act (APA), 5 U.S.C. 551(4) as well as general understanding. Therefore, the Commission properly undertook to revise the formula under the informal rulemaking procedures of Section 4 of the APA, 5 U.S.C. 553. The standard for appellate review of such actions is the "arbitrary and capricious test of 5 U.S.C. 706(2) (A)-(D). This test is distinguishable from the more rigorous substantial evidence and de novo review standards of 5 U.S.C. 706(2)(E) and (F). Abbott Laboratories v. Gardner, 387 U.S. 136, 143 (1967). Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-415 (1971). While we believe the case should be sustained under any standard, all that is required under the arbitrary and capricious test is "a rational connection between the facts found and the choice made." Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168 (1962). See also, United States v. Allegheny-Ludlow Steel Corp., 406 U.S. 747, 749 (1972) and National Nutritional Foods Ass'n. v. Weinberger, 512 F.2d 688, 700-701 (2nd Cir. 1975), cert. denied, 423 U.S. 827 (1975).

Nor can the 1976 Formula be faulted as an attempt to interject competition for competition's sake in violation of FCC v. RCA Communications, Inc., 346 U.S. 86 (1953) and Hawaiian Telephone Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974). The Commission "must not assume that competition is desirable for its own sake," Pocket Phone Broadcast Service, Inc. v. FCC, 538 F.2d 447, 451 (D.C. Cir. 1976), but "there can be no doubt that competition is a relevant factor in weighing the public interest," 346 U.S. at 94. This case does not involve any addition to present "service" solely to increase competition as in RCA and Hawaiian. Here, competition is being properly used as a regulatory tool, providing "complementary or auxiliary support," 346 U.S. at 93, to aid the Commission in attaining its section 222(e)(3) goals. It is being rationally utilized to maintain a just and equitable distribution of international telegrams, and to provide a continuing incentive for the carriers to improve services and keep costs down.

Review of this case is facilitated, because, in addition to the basic facts developed in the prior agency proceedings, the Commission and the Court have the benefit of a year of experience under the 1976 Formula. There is no question that the telegrams are being efficiently distributed and delivered to their destinations, and there is evidence that the new formula does encourage improvements in service. ITT listed seven major improvements to its service which were undertaken in large part because of the incentive provided by the revised formula. ITT Comments (SJA 1040-1044). The Commission found that those

improvements "are of the type we anticipated the formula would inspire, and provide concrete confirmation of the new formula's service to the public interest." (SJA 964).

Unlike the situation with the all-routed proposal, the Commission had resolved all questions concerning the "possible operational, economic and legal implications," 559 F.2d at 891 (SJA 945), of the interim formula. The year of uneventful operation confirms the completeness of the operational details incorporated into the formula. For exact operational details see Report and Order, 57 FCC 2d at 216 (J.A. 45). The economic implications received extensive study. Charts and discussion by the Commission precisely showed the breakdown of traffic under both the 1943 formula and estimated the impact of the 1976 Formula. For example with regard to RCA, it was shown that RCA received 48.2% of the unrouted traffic under the old formula, but that under the new formula it would receive only 33.1% unless it improved its competitive position. 57 FCC 2d at 199, and table 2 (SJA 1130). The Commission even analyzed RCA's worst case statements of revenue shift which might be caused by the new formula, and determined that it would amount to 6.3% of RCA's net income, a loss which the Commission believed would not outweigh the public benefits to be achieved. Reconsideration (J.A. 502). The Commission

also devoted extensive discussion to its legal authority to adopt and enforce the 1976 Formula in both the Report and Order and the Reconsideration Order. See, e.g., J.A. 71-75.

Examination of RCA's alternative proposals reveals that its real complaint is not that the 1976 Formula is inequitable or harmful to the public interest, but that it will cause revenues to be shifted from RCA to other carriers. For example, if a formula change is deemed appropriate, RCA would support the 1976 approach as long as it is "phased-in" over a period of years, thus reducing the "short-term costs" of immediate implementation. RCA Comments (SJA 997-999). We submit that if the 1976 formula really violated the public interest for the three reasons RCA relied upon, a phase-in would not cure the public interest defects. The only difference between the Commission's approach and RCA's "phase-in" suggestion is that the latter permits RCA to hang onto "the lion's share of the unrouted business,"^{11/} for years longer. But as the Court here observed, this is not RCA's legal right:

[T]he 1943 Formula did not create a contract in perpetuity apportioning revenues and did not relieve the FCC of its statutory duty to prescribe a "just, reasonable, equitable and in the public interest" formula.^{12/}

11/ 563 F.2d at 2 (SJA 947).

12/ Ibid. See also 57 FCC 2d at 212 (SJA 1143).

II. THE COMMISSION'S PROCEDURES ON REMAND WERE ADEQUATE.

RCA argues that the single round of comments allowed on remand was inadequate to illuminate the issues involved, and that the Commission should have authorized a full hearing, including rebuttal comments, limited discovery, and cross-examination or interrogatories. Br. pp. 50-53. RCA has apparently forgotten that the Court ordered a "limited remand" to permit the Commission to show "whether the promulgation of this 'interim' formula has, in the opinion of the FCC, a factual basis on the record independent of the FCC's tentative preference for an all-routed system." 563 F.2d at 3 (SJA 948).

The suggestion that the parties be allowed to submit additional comments was simply to give them a chance to provide whatever proof the 10 months of operating experience might supply in support of their contentions. 563 F.2d at 3 (SJA 948). The Court's suggestion that only 30 days be allowed for these comments showed that it did not contemplate another full hearing. Ibid. The Commission was not invited to start afresh, but instead was to clarify and build upon the substantial record already in existence.

It was "because of the importance of the time element," an apparent reference to RCA's August 17, 1977 Motion For Issuance of Mandate Forthwith, that the Court did not suggest more time for the additional comments.^{13/} RCA cannot now sandbag the Commission by claiming that it

^{13/} 563 F.2d at 3 (SJA 948). RCA argued that time was of the essence because "[e]ach day that the issuance of this Court's mandate is delayed will cost RCA Globcom approximately \$5,000 more." Motion for Issuance of Mandate Forthwith, p.7.

committed error by not undertaking more proceedings at the risk of exceeding the Court's suggested deadline. If RCA, the primary cause of the acceleration, desired to have more proceedings to test opposing views, it was incumbent upon it to have made the appropriate requests to the Commission. Since it did not raise this issue before the Commission, RCA is barred by Section 405 of the Communications Act, 47 U.S.C. 405, from litigating it now before the Court. Gross v. FCC, 480 F.2d 1288, 1290-91, n.5 (2nd Cir. 1973), Western Union International, Inc. v. FCC, No. 77-4183, slip op. at ^{14/} 792 (2nd Cir. December 21, 1977).

^{14/} The Commission has broad discretion on remand both as to the substance of what it will do to correct an error and the procedures it will utilize to make the correction. National Association of Motor Bus Owners v. FCC, 460 F.2d 561 (2d Cir. 1972). In any event, it is apparent that further proceedings on the two points suggested by RCA would have contributed little of value to the lengthy record already compiled in this case. First, even if it could be proved that the improvements made by ITT "would have made similar sense if the original formula had remained in effect," Br. p. 52, this would contradict neither the fact that these improvements were made under the 1976 Formula nor the inference that the 1976 Formula encourages service improvement. Second, RCA's desire to expose whether the other carriers had increased their solicitation costs under the interim formula, Br. p. 53, appears to overlook what the record already revealed on this point. Both TRT and WUI commented on this point and stated that they had not increased such costs. See TRT Comments (SJA 1074) and WUI Comments (SJA 1016).

CONCLUSION

For the foregoing reasons, the Commission's decision should be affirmed.

Respectfully submitted,

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March 20, 1978,

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RCA GLOBAL COMMUNICATIONS, INC.,)
Petitioners,)
)
v.) No. 76-4054
)
FEDERAL COMMUNICATIONS COMMISSION)
and UNITED STATES OF AMERICA,)
Respondents,)
)
ITT WORLD COMMUNICATIONS, INC.,)
TRT TELECOMMUNICATIONS CORPORATION,)
WESTERN UNION INTERNATIONAL, INC.,)
Intervenors.)

CERTIFICATE OF SERVICE

I, Mary Ross, hereby certify that a copy of the printed "Brief for Respondents," was forwarded by U.S. Mail, first-class, postage prepaid, on the 20th day of March, 1978 to the persons listed below:

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